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9
10 UNITED STATES OF AMERICA
11 BEFORE THE NATIONAL LABOR RELATIONS BOARD
12

13 STEVEN LUCAS,

14 Charging Party,

15 and

16 JAMY RICHARDSON,

17 Charging Party,

18 and

19 ENCORE PRODUCTIONS, INC.,

20 Employer,

21 and

22 INTERNATIONAL ALLIANCE OF
23 THEATRICAL STAGE EMPLOYEES,
24 MOVING PICTURE TECHNICIANS,
25 ARTISTS AND ALLIED CRAFTS OF THE
26 UNITED STATES, ITS TERRITORIES AND
27 CANADA, LOCAL 720, AFL-CIO, CLC,

28 Respondent.

Nos. 28-CB-107693; and
28-CB-113281

**RESPONDENT'S MOTION FOR
RECONSIDERATION**

1 (1) Respondent moves the Board to reconsider the last paragraph in footnote 3 of its Decision
2 and Order. This case has been pending for almost six years. The Board could have figured out
3 these issues. If the Board couldn't figure out the scope of the information to which the Charging
4 Party is entitled, there is no violation. It cannot send the complaint allegations which define the
5 scope of a violation back to compliance hearings.

6 The Board is limited to a remedy for the one employer where the General Counsel put on
7 evidence. The record establishes an exclusive relationship with that employer. In addition,
8 however, no evidence was presented as to the other employers, and the Board is precluded from
9 finding that an exclusive arrangement existed with any of the other employers. *Carpenters Local*
10 *1102 (Detroit Edison Co.)*, 322 NLRB 198, 203 (1996), and *Fisher Theatre*, 240 NLRB 678, 679
11 and 690 (1979).

12 The remand effectively is a finding by the Board that there is no evidence in the record to support
13 a finding of jurisdiction or exclusive referral system as to other employers. The remand will
14 allow the General Counsel to add to the record to prove this. The General Counsel has failed to
15 prove her/his case. There is no record evidence as to any other employer, and any complaint
16 allegations as to other employers should be dismissed.

17 The same is true for any information request Mr. Lucas made. If the General Counsel couldn't
18 prove what those requests were and that the Respondent failed to respond to those requests, the
19 lack of proof cannot be fixed in a compliance hearing where the General Counsel can put on more
20 evidence. This is just a failure to prove the General Counsel's case. It is a failure to seek to
21 reopen the record.

22 The Board cannot leave to compliance proceedings jurisdictional issues, issues as to the merits of
23 whether there was an exclusive referral arrangement and the scope and nature of any information
24 request.

25 Indeed, leaving the scope of information requests to compliance proceedings will leave open this
26 procedure for requests made by unions (or employers). These are determinations as to whether
27 the Act was violated, and the Board cannot even conduct a compliance hearing based on a
28 compliance specification until there a violation of the Act has been found and potentially

1 enforced by the court of appeals. The Board has recently rejected this proposition except in
2 limited circumstances of “accommodative bargaining.” See *NP Palace LLC*, 368 NLRB No. 148
3 (2019).

4 This is particularly problematic since Lucas asked for information concerning other hiring of
5 referents, not for himself. The Board has not answered the question whether Lucas, as an
6 individual, has the right to be the self-appointed and anointed representative of other employees.

7 Indeed, the Board leaves to compliance that important question. This is improper.

8 It is not surprising the Board cites no precedent. There is none. But see *D.L. Baker, Inc.*, 351
9 NLRB 515, 519 (2007), *American Alpha Construction*, 340 NLRB 322 (2003), *Consolidated*
10 *Delivery*, 344 NLRB 544 (2005) and *Trade Force*, 338 NLRB 777 (2003).

11 The Board’s Rules provide for a limited purpose for compliance proceedings:

12 §102.55 Contents of compliance specification.

13 (a) Contents of specification with respect to allegations concerning
14 the amount of backpay due. With respect to allegations concerning
15 the amount of backpay due, the specification will specifically and in
16 detail show, for each employee, the backpay periods broken down
17 by calendar quarters, the specific figures and basis of computation
of gross backpay and interim earnings, the expenses for each
quarter, the net backpay due, and any other pertinent information.

18 (b) Contents of specification with respect to allegations other than
19 the amount of backpay due. With respect to allegations other than
20 the amount of backpay due, the specification will contain a clear
21 and concise description of the respects in which the Respondent has
22 failed to comply with a Board or court order, including the remedial
acts claimed to be necessary for compliance by the Respondent and,
where known, the approximate dates, places, and names of the
Respondent’s agents or other representatives described in the
specification.

23 There is no way to issue a specification where it cannot describe how the Respondent has failed to
24 comply with a Board Order which in footnote 3 remands to a compliance proceeding to
25 adjudicate the remedy. Doesn’t work at all.

26 (2) The Supreme Court’s Decision in *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), reinforces
27 the Union’s Exceptions that Nevada’s right to shirk law is unconstitutional as applied. First, the
28 Union members have a right to refrain from associating with Mr. Lucas. This is not only a

1 statutory issue but also a constitutional issue. Second, to the extent that the Nevada right to shirk
2 law could be interpreted to require the Respondent to have a duty of fair representation towards
3 non-members, this is state action which violates the right of association of members. This is thus
4 invalid under *Janus, supra*. Third, the right of association includes the right not to associate with
5 Mr. Lucas. That right therefore means that the workers who are on the out of work list do have
6 the right to protect their privacy and association with Mr. Lucas by refusing to have their
7 information disclosed to him. Respondent is entitled to, if not required to, protect that right.
8 Finally, this is a due process issue: Respondent should not be forced to spend member's resources
9 on a non-member who refuses to pay any costs of representing him and operating the referral
10 system. The Board has failed to respond to this constitutional Issue. The Act is unconstitutional
11 to the extent the Union is forced to expend resources and associate with Mr. Lucas.

12 (3) The Motion for Reconsideration should be granted.

13
14 Dated: March 26, 2020

WEINBERG, ROGER & ROSENFELD
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15 /s/ DAVID A. ROSENFELD

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CERTIFICATE OF SERVICE

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the withing action; my business address is 1001 Marina Village Parkway, Suite 200, Alameda, California 94501. I certify that on March 26, 2020, the RESPONDENT'S MOTION FOR RECONSIDERATION document was served on the following parties as addressed below via E-Filing, E-Mail, and Overnight Mail:

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I certify under penalty of perjury that the above is true and correct.
Executed in Oakland, California, on March 26, 2020.

/s/ Aaron Nathan

Aaron Nathan

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